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No. 84-1305

Supreme Court, U.S.
FILED
MAR 18 1985
ALEXANDER L. STEVAS
CLERK

In the
Supreme Court of the United States

October Term, 1984

Carolyn Epperson, *Petitioner*

V.

Estate of Buel Epperson, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Estate of Buel Epperson, Respondent herein, prays that the Petition for Writ of Certiorari to review the judgment of the Arkansas Supreme Court entered in the above entitled case on December 17, 1984 be denied.

REASONS FOR DENYING THE WRIT

1. NO CONFLICT EXISTS SUFFICIENT TO MERIT CERTIORARI BETWEEN THE DECISION OF THE ARKANSAS SUPREME COURT HEREIN, THE DECISIONS OF THIS COURT, AND THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT.

The conflicts which the petitioner posits between this decision, prior decisions of this Court, and decisions of other state courts of last resort can only charitably be classified as wishful thinking. Petitioner's attempt to pigeonhole the decision below as somehow being contrary to some prior holding of this Court is jurisprudentially based upon so broad and general a brush as to be safely ignored.

To be sure, the statute in question was one of many statutes amended under Arkansas Act 714 of 1981 which was an omnibus statute amending numerous Arkansas laws so as to erase gender-based statutory distinctions in Arkansas statutory law. However, from this unassailable position, Petitioner makes the patently unsustainable argument that any additional legislative objective (e.g. the preclusion of "Deathbed" spouses being able to inherit a statutory interest absent such a specific disposition by the testator), which goes beyond the main purpose of the omnibus statute can only be judged for constitutional purposes by the standard of "Does it seek to erase gender-based classifications?"

Arkansas Statute §60-501, both before and after its amendment by Arkansas Act 714 of 1981, had as its purpose the definition of those surviving spouses who could elect to take against a will. The present statute is reasonably related to this objective in that it excludes from that category those persons who have been married to the decedent for less than a year. Upon this statutory scheme, the petitioners try to superimpose only the most general language from prior decisions of this Court. More controlling on the facts in this case insofar as equal

protection analysis is concerned is the following prior discussion by this Court:

> "We have declared so often the wide range of discretion which the legislature possesses in classifying the objects of its legislation that we may be excused from a citation of the cases. We shall only repeat, *the classification need not be scientific or logically appropriate and if not palpably arbitrary and is uniform within the class, it is within such discretion.*" (emphasis supplied) *Mutual Loan Co. v. Martell*, 222 U.S. 225, 32 S.Ct. 74 (1911).
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> . . .
>
> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the states a wide scope of discretion in enacting laws which affect some groups and citizens differently from others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A *statutory discrimination will not be set aside if any set of facts reasonably may be conceived to justify it.* (Citations omitted)" (emphasis supplied) *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101 (1961).

With reference to this well-accepted presumption accorded a state that it has acted within its constitutional power, as Mr. Justice Frankfurter observed, in order to give "the statute the full benefit of the presumption . . . , we must find clear incompatibility before it can be invalidated." *New York v. O'Neal*, 359 U.S. 1, 6 (1959). This "clear incompatibility" can hardly be said to have been presented by Petitioner's rote recitation of general equal protection principles.

Likewise, in the two cases upon which Petitioner seeks to predicate a conflict with "decisions of other state courts of last

resort" (i.e. *Estate of French, Key v. Doyle*, 365 A.2d 621 (Dist. Col. App. 1976) Cert. denied and App. dism'd 434 U.S. 59 (1977); and *In re Estate of Cavill*, 459 Pa. 411, 329 A.2d 503 (1974), there is only a faint resemblance to the case now before the Court. In those two cases, the "Mortmain" statutes negated any devises or bequests to religious groups made within thirty days of the death of the testator. Those statutes and the Arkansas one here stand on distinguishable jurisprudential grounds. As the Pennsylvania Supreme Court noted in analyzing the practical effect of the "Mortmain" statute:

> "While the legislative purpose is to protect the decedent's family, the statute nevertheless seeks to nullify bequests to charity even where, as here, the testator leaves no immediate family . . . This protection of a nonexistent "family" defeats the testator's expressed intent without any relation to the purpose which is thought to be promoted, further demonstrating the irrationality of the statutory classification." 329 A.2d at 506.

This practical effect of defeating the testator's expressed intent highlights a critical distinction between the statutes involved for the only act which is required to give full effect to the testator's intent under Arkansas Statute §60-501 is for the decedent to simply have made out a will including the spouse of less than a year, a small act indeed. While we acknowledge that this distinction in itself is not determinative for purposes of certiorari, we likewise submit that it is dispositive in showing that no conflict exists among the highest courts of the various states for it shows that different questions were presented in the cases cited by Petitioner.

2. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

Petitioner has failed to sustain her burden for showing that a substantial federal question is presented to this Court for two reasons. First, there is a complete dearth of

any showing that more than a minuscle number of people (i.e., those married less than a year who have not been devised or bequeathed an amount of the decedent's estate equal to or greater than the statutory share) in one state could conceivably be affected by this statute. There has been no argument or rationale advanced to remove this case from what this Court has previously negatively referred to as the "episodic" in denying certiorari. (*Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955) or that there is any overriding importance to the public as distinguished from the parties (*Layne and Bowler Corp. v. Western Wellworks*, 261 U.S. 387, 393 (1923) so as to justify certiorari being granted.

Secondly, inasmuch as the petitioner's equal protection attack upon the statute in question rests solely upon the fact that there is a legislative classification involved, we submit that prior decisions prevent any substantial federal question from being raised. This Court has previously acknowledged a state's significant interest in regulating the disposition of an individual's property at death (See *Harris v. Zion's Bank Co.*, 317 U.S. 447, 63 S. Ct. 54 (1943) and has previously acknowledged that the state's power in this area permits it constitutionally to determine who may give and who may receive property at death, whether by will or intestacy, under what circumstances and by what methods (See *Labine v. Vincent*, 401 U.S. 532, 537 (1971), reh. den. 402 U.S. 990 (1971). In that case, Mr. Justice Black, speaking for the Court, observed the following about Louisiana's Intestate Succession laws and Constitutional anaylysis:

> "Even if we were to apply the rational basis test to the Louisiana Intestate Succession Statute, that statute clearly has a rational basis, in view of Louisiana's interest in directing the disposition of property left within the state." 401 U.S. at 536.

. . .

> "The choices reflected by the Intestate Succession Statute are choices which it is within the power of the state to make. The Federal Constitution does not give this Court the power to overturn the State's choice under the guise of constitutional interpretation, because the Justices of this Court believe that they can provide better rules." id. at 537.

Regardless of how it is twisted or turned, it is an invasion upon the normal zone of State decision making which the petitioner asks this Court to make solely upon the grounds that the Arkansas Legislature has elected to treat surviving spouses married to the decedent more than a year differently from those married less than a year. As Mr. Justice Stewart once noted:

> "... such discrepancies are the inevitable concomitant of the line drawing that is essential to law making. So long as the classification is rationally related to a permissible legislative end, therefore, ... there is no denial of equal protection." *Kramer v. Union Free School District*, 395 U.S. 621, 637 (1969).

CONCLUSION

Here there is no suspect classification so as to warrant strict scrutiny, and no mandate that the State demonstrate that the statutory distinction as drawn was done so with mathematical precision (See *Dandridge v. William*, 397 U.S. 471, 90 S.Ct. 1153 (1970). There is merely a statute addressing an area uniquely appropriate for state legislation and no defect contained in it, other than a classification. This Court has made clear findings about such a set of facts in the past. As we have shown above, there is no need to do so again.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

The affiant, Merl O. Barns, counsel for Respondent, after being duly sworn, certifies that on March 14, 1985, pursuant to Rule 28.5 (c), Rules of the Supreme Court, I served Carolyn Epperson three copies of the attached Brief in Opposition to Petition for Writ of Certiorari on each of the parties herein, as follows:

On Carolyn Epperson herein, by hand-delivering to the office address of Richard L. Smith, the above-named Carolyn Epperson's counsel of record at Suite 727, Pyramid Place, P.O. Box 3644, Little Rock, Arkansas 72203.

All parties required to be served have been served.

/s/ Merl O. Barns
Merl O. Barns

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Attorney for Respondent

SUBSCRIBED AND SWORN TO before me on this 14th day of March, 1985.

/s/ Jeanie Ruth Stare
Notary Public

My Commission expires:

10-1-90